United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1576

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,

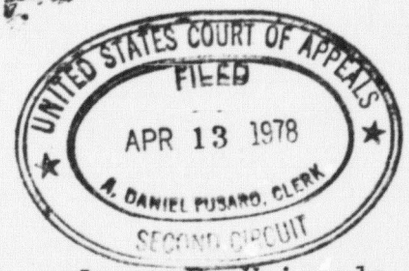
Plaintiff-Appellee

v.

James F. Heimerle, and Richard Warme,
a/k/a Richard Warner,

Defendants-Appellants.

Petition of Defendant-Appellant James F. Heimerle
for Rehearing and Suggestion for Rehearing
En Banc



James F. Heimerle
Appellant pro se
PMB 01873
Atlanta, Ga. 30315

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NO. 76-1576

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UNITED STATES OF AMERICA,

-v.-

JAMES F. HEIMERLE, and RICHARD WARME, a/k/a/ Richard Werner,

Defendants-Appellants

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PETITION OF DEFENDANT-APPELLANT JAMES F. HEIMERLE FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Preliminary Statement

The defendant-appellant, James F. Heimerle, respectfully petitions for rehearing, and suggests rehearing en banc, of the opinion of a panel of this Court (Lumbard, Waterman and Van Graafeiland, Circuit Judges), filed March 6, 1978, affirming a judgment of conviction entered in the United States District Court for the Southern District of New York on November 15, 1976, affirming also, a sentence double in proportion to the statutory maximum, imposed under 18 U.S.C. § 3575 (e)(1), i.e., 10 years for a violation of 18 U.S.C. § 371.

Summary Statement

At the trial below Heimerle did not take the witness stand; no opening statement was made that would give any indication that Heimerle's character would be put in issue: the government was put soley to the test of proving Heimerle's guilt beyond reasonable doubt -- and, Heimerle relied upon the presumption of innocence that is afforded to every criminal defendant as required by due process. (5th Amendment)

The government introduced during tneir case-in-chief two prior convictions for the same type offenses: one of which, contained the fact that Heimerle had to complete a state sentence before commencing service on his federal sentence for counterfeiting.

The government relied upon the transcript of the trial in the second counterfeiting conviction to show that the same method was used to show Heimerle's first conviction for counterfeiting. [The second counterfeiting conviction will hereinafter be referred to as Heimerle II]. The government did not introduce the prior convictions through witnesses -- what they did do -- was to mechanically introduce them to"show a criminal predisposition on the part of this defendant[Heimerle]to engage in that shere of criminal activity[counterfeiting per-se]" (Transcript page 38-39, Heimerle II). The trial court below relied upon this precedent to put into evidence Heimerle's two prior counterfeiting convictions [realistically two federal & one unspecified state conviction which called for an unspecified penitentiary term], by reading

them, in toto, to the jurors. That is, the prosecutor read them to the jurors. (Tr.p. 456)

The government in an Affidavit, opposing a motion to vacate sentence imposed in Heimerle II, said: "It is further submitted that any adverse prejudice obtained as a consequence of the introduction of these[federal & state]convictions during the Government's direct case was removed when the petitioner[Heimerle] testified on his own behalf and was confronted with his prior criminal conviction history, including the two(sic) prior convictions for counterfeiting." at par.9-dated 11/14/77.
It must be noted that there was only one counterfeiting conviction -- and, as noted by this Court's panel at footnote 5 in this instant appeal -- that counterfeiting conviction has been set aside.

In this instant appeal Heimerle raised these issues in points II and III of the main brief. The government did not refute the issues with any authorities -- from this Circuit or others -- and, in Heimerle's Supplementary Reply Brief, Heimerle pointed to other authorities that show conclusively that prior conviction evidence is not permissable when a defendant does not put his character into issue. Boyd v. United States, 142us450,458 (1892); Michelson v. United States, 335us469 (1948); United States v. Harrington, 490 F 2d 487, [4][7] (2d Cir 1973) (Waterman).

It is undisputed that Heimerle did not put his character into issue at any stage of the proceeding before the jury. However, for one reason or another the original panel eliminated points II and III of Heimerle's brief from their narrative of the trial below. Further, the panel omitted ruling upon these egregious errors as having no merit.

Rehearing and rehearing en banc is suggested because this panel's opinion can only be construed to mean that the government can without question introduce any defendant's prior criminal convictions per se. If that is what the original panel had intended as a result of their sub silentio approval of the government's interpretation of Rule 404(b) F.R.Evid. -- well, then, Heimerle suggests that it be made known that the Second Circuit condones and approves of the procedure utilized by the government below. And accordingly, give their explicit stamp of approval and authorities relied upon for so doing.

Other defendant's and the Bar is entitled to know that a government attorney may at his discretion -- prove a defendant's predisposition to commit crimes during the case-in-chief. Also, since the character of a criminal defendant may now be introduced as was in the trial below. This Court, en banc, ought to overrule the holding to the contrary in Harrington, supra. Or, at the very least make known what is the posture of rulings such as that in Harrington?

The enhanced sentence imposed upon Heimerle pursuant to 18 U.S.C. 3575 (e)(1) rested in part, on the conviction in Heimerle II; the sentence of which was increased from the statutory maximum of five years to ten. Although there are other state convictions, as noted in footnote 5 of this panel's opinion. The Court in Heimerle II deemed that they were not suitable to invoke the provisions of 3575 for increased sentencing. The government did not agree. They appealed (76-1375) from the decision.

While 76-1375 was pending on appeal the government filed a second 3575 Notice to increase Heimerle's sentence upon conviction of the instant case, Heimerle III.

The government's appeal in 76-1375 was dismissed upon their motion to withdraw on November 24, 1976, without opinion.* [Heimerle was sentenced in the instant case on November 15, 1976].

It is obvious from the application to increase Heimerle's sentence in Heimerle II that the Court did not agree. The decision of the Court therein did not become final until after that conviction was used to cause the Court below, in Heimerle III, to invoke 3575, and sentence Heimerle to double the otherwise legal maximum of five years for violating 18 U.S.C. 371.

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* "...withdrawal or dismissal of review taken by the government forecloses imposition of a more severe sentence, but otherwise does not remove the case from the consideration of the Court of Appeals...In any case in which a sentence or review is taken either by a defendant or the government, the Court of Appeals must state in writing the reasons for its disposition of the review. Cong Admin. News, PL 91-452 at 4039.

In any event, the Court of Appeals did not state the reasons for granting the government's motion to withdraw. Moreover, at least one Circuit has ruled "... a prior conviction is not final when it is subject to direct appellate review so that defendant should not have been subjected to enhanced punishment based on a prior conviction which was pending on appeal." The Court also stated: "We are reinforced in our position by the weight of authority among the state courts that, while an appeal is pending the defendant cannot be considered as having been convicted for purposes of a recidivist statute." * The only reason the 3575 proceedings were sought for a second time was because Heimerle refused to cooperate and wanted to go to trial -- Heimerle would not plead guilty! (Tr.p.[illegible]). Cf. Another court wherein they declared: the recidivist charge in response to the defendant's refusal to plead guilty was an impermissable retaliation. ** At the very least the prosecutor must meet burden of justifying actions i.e., defendant refused to waive rights to trial by district court judge instead of magistrate. ***

In the instant case the prosecutor invoked 3575 because Heimerle demanded on having another trial immediately. (Tr. p. [illegible]).

This instant case, Heimerle III, if presented to one grand jury instead of being presented piecemeal to three separate and

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* United States v. Allen, 566 F 2d 1193, 1195. (3rd Cir 1977)
** Hayes v. Cowan, 547 F 2d 42, 44 (6th Cir 1976)
*** United States v. Ruesga-Martinez, 543 F 2d 1367, 1370-71 (9th Cir 1976)

distinct grand jurys. Which is another fundamenatal part of due process denied Heimerle, i.e., one grand jury hearing all the evidence may have felt it wiser to charge one conspiracy or on the other hand feel that one indictment was in itself enough to satisfy the ends of justice. However they [one grand jury] would have voted is now only speculative due to the prosecutor's manipulation of three open-ended grand juries. * As the facts are in this case there can be no denial that Heimerle was not afforded due process by any outside chance of inadvertance. No, as the investigation opens on December 10, 1975, when Horowitz was arrested by the secret service for passing a counterfeit $100 bill, up until the time of Heimerle's arrest in February was all one single secret service investigation that was geared to add-on extra charges for prosecutorial purposes.

Statement of the Case

On December 10, 1975, Peters and Horowitz met; then they proceeded to Gimble's Department Store to pass counterfeit bills (Tr. p. 388): Peters was Horowitzs' holder; Horowitz was observed by Peters being taken away by two detectives (Tr. p. 401-03): Horowitz was locked up(Tr p. 165)** Horowitz, according to agent Hemmer might have signed a waiver of rights form (Tr.p. 515).

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* In United States v. Phillips Petroleum Co., 435 F.Supp.610 and 622 (two cases) at [5][6][7][10]&[11] also see [5] of case # 2. See, also United States v. Provenzano, 75 Cr 1194, opinion # 46550 citing from Phillips, supra, Bonsal, D.B. 11/11/77.

** Peters testified before the Grand Jury: "He was arrested but he was released in a matter of a half hour" Page 28, 3/4/76

On January 4, 1976, Heimerle was observed in the company of Peters in Dobbs Ferry New York by Sergeant Malara of the Dobbs Ferry Police Department; who also observed another white male (Tr p. 415-20); the white male was Richard Warme (Tr.p. 422-23)

On January 11, 1976, Secret Service Agent, Zoma, was assigned as an undervover agent in the investigation that was underway (Tr. p. 426); also assigned was agent Vezeris; agent Hemmer and others; all of whom are members of the counterfeiting squad(Hearing Tr.p. 4,5 of 9/13/76 Pollack, Judge); agent Heavey is their Supervisor (Tr.p. 152-53 of Heimerle II trial, Metzner, Judge).

On January 23, 1976, Peters was interviewed by a special agent of the Secret Service. Peters sent for them to tell them about the counterfeiting activities of Heimerle. Peters identified Heimerle from a photograph as the man he had been dealing with in counterfeit: Peters also told them that Heimerle had sold half a million dollars worth of counterfeit;* and, told the secret service men to look for the printing press in Brooklyn, N.Y. (Grand Jury testimony of March 4, 1976, pages 10-11,16).

On January 26, 1976, John Francis Rawles was arrested; as a result of same: Julian Mitchell was selling counterfeit to an undercover agent. The agent worked in the counterfeiting squad

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* Peters also answered "Yes" to the following question: "Did you further tell the Secret Service that you had knowledge that Heimerle had sold a substantial quantity of counterfeit 100 dollar notes to Richard Warne ." The debriefing was from January 23, 1976 according to Peters Grand Jury testimony.

under the Supervision of agent Heavey; Julian Mitchell telephoned Heimerle -- under the orders of the Secret Service on January 27, 1976. Then, on January 28, 1976 Julian Mitchell met Heimerle at a predetermined location while under surveillance and monitored. Heimerle allegedly furnished Julian Mitchell with $5,000 in counterfeit obligations.

On February 2, 1976, John Francis Rawle and Julian Mitchell were indicted for counterfeiting violations. The Foreman of the Grand Jury was named Paul Potter.

Also on February 2, 1976, Heimerle proceeded to meet Julian Mitchell at the predetermined location utilized on January 28th. Upon arriving there Heimerle was advised that Julian Mitchell had not kept the appointment. This message was conveyed to Heimerle by another member of the Secret Service, working undercover under the supervision of Supervisor Heavey. Heimerle was charged with a sale of $5000 made to said agent, discussed infra.

On February 5, 1976, Heimerle once again proceeded to meet Julian Mitchell. Once again Julian Mitchell failed to keep the appointment. Once again the undercover agent was present. Still working under the supervision of Agent Heavey., Heimerle had promised the undercover agent that if Julian Mitchell got in touch with Heimerle. Heimerle would convey the message that the undercover agent was looking for him. Heimerle gave to the undercover agent a telephone number to contact him at that evening.

On February 6, 1976, at approximately 12:02 A.M., Heimerle was contacted by the undercover agent, who was calling from the office of the Secret Service. During this phone call Heimerle allegedly told the undercover agent that he could not furnish the full amount of counterfeit but, he could in fact furnish a lesser amount. Afterwards Heimerle allegedly delivered the counterfeit to the undercover agent, and was arrested.
At approximately 5 A.M. agents seized, among other things, a printing press and other equipment believed responsible for printing counterfeit obligations. *

On February 11, 1976, Heimerle was indicted by a Grand Jury other than the Grand Jury that indicted Julian Mitchell and John Francis Rawle. The Foremen's name was Harry Kaufman. The Grand Jury indicted Heimerle for the sale made to Julian Mitchell on January 28th and the sales of February 2nd and 6th.
Shortly thereafter a trial date was set for May 3, 1976. The Heimerle II trial.

On February 20, 1976, the 'special attorney' Alan R. Naftalis, filed Notice (sua sponte) that Heimerle was a Special Offender for purposes of the Heimerle II trial.

On March 4, 1976, Peters appeared before a Grand Jury other than the two named supra. Peters testified in regard to what

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* The original panel of this Court referred to that arrest as another counterfeiting operation.

he had told the Secret Service during his debriefing of January 23, 1976. The Foreman of the Grand Jury was Harry Fink.

On March 11, 1976, co-appellant Richard Warme was indicted for violations of the counterfeiting laws. Indictment No. 76 Cr 243. This Indictment purports to bear the signature of Robert B. Fiske, Jr.

On April 29, 1976, the Warme indictment was superceded to include Heimerle, Horwitz and Peters. * The original panel at page 4 of their opinion refer to the date of this indictment as May 29, 1976. Apparently relying upon the accuracy of the government's statement of facts.

On May 3, 1976, trial commenced before Judge Metzner and a jury. After a three day trial Heimerle was convicted of violating 18 U.S.C. 473, three counts. And for conspiring with one codefendant and others unknown to the grand jury to violate same. Sentence was set for June 4, 1976.

On May 11, 1976, Heimerle was arraigned on the indictment handed down by the Grand Jury that indicted Heimerle on April 29, 1976. The arraignment was before Judge Pollack. The trial Judge below.

On June 15, 1976, after a ten day posteponement to comply with the ten day requirement of 3575 (b)'s Notice to defendant

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* This Indictment No. 76 Cr 442 also purports to have been signed by Robert B. Fiske, Jr., however, it is not. As such whoever signed it violated 18 U.S.C. 505. Both 76 Cr 243 and 76 Cr 442 were certified by the Clerk of the Court as bearing the signature of Fiske by virtue of certifying both indictments to be true and correct copies.

that defendant is to be afforded a 3575 Hearing; Heimerle was sentenced to Seven years on each of the substantive counts of the indictment thereunder,concurrently; and five years on the conspiracy count. The latter was a rehabilative sentence of probation; which was to commence upon completion of the three seven year terms that ran concurrent.

On September 13, 1976, trial was to commence in Heimerle III, the instant case. However, the government moved for an adjournment.

On September 17, 1976, trial was to commence following the Suppression Hearing. However, once again the government moved for an adjournment. Heimerle was not delivered to the Court by the United States Marshall's. Heimerle's attorney -- Michael Pollack -- was also absent during the Warme Suppression Hearing. Unbeknownst to Heimerle Michael Pollack's brother, Elliot Pollack, was present. Elliot Pollack at that time was not a member of the local Bar nor was he an associate listed in the Law Firm of Michael Pollack. *

On September 21, 1976, while the government's appeal was still pending in this court -- the appeal from Judge Metzner's denial to apply enhanced sentence under 3575....Appeal Docket No. 76-1375. 'Special Attorney' Alan R. Naftalis, once again

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* See, Martindale-Hubble Law Directory, 1976 Editions at page 224 N.Y.City, and 189 Massachusettes. Neither Pollack lists the other. To hold one self out as a partner or associate violates the Professional Code of Responsibility. DR 2-102(c)

filed Notice to seek enhanced sentences pursuant to 3575 should Heimerle be convicted of the offenses charged.*

On September 23, 1976, trial was to commence in the instant case once again. Once again the United States Marshalls did not deliver Heimerle to the Court. The government moved for another adjournment.

On September 26, 1976, trial commenced: on October 1, 1976 the jury returned a guilty verdict in regard to the conspiracy count notwithstanding their disbelief of all the testimony of all co-conspirators indicted or otherwise; the substantive counts as a result of their failure to believe the witnesses caused a mis-trial and subsequent dismissal of these three counts. Sentence was set for November 15, 1976.

On October 26, 1976, twenty-five days after the conviction of Heimerle in Heimerle III. The government motioned this court to withdraw their appeal from Judge Metzner's adverse ruling in Heimerle II. Heimerle refused to enter into a stipulation to permit the withdrawal.

On November 15, 1976, the date that was set for sentencing purposes.....A 3575 Hearing was held pursuant to Notice filed with Judge Pollack. Judge Pollack did not set a date for the

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* The offenses charged in the indictment thereunder carried a maximum of thirty-five years. i.e., three counts of 18 U.S.C. 473 and one count of 18 U.S.C. 371. Under the 3575 enhancement provision [repealed in S-1437] Heimerle faced a total sentence of one-hundred years. To read it anyother way obviated the need to file for enhanced sentence when statutory maximums exceed the twenty-five year maximum provided in 3575.

Hearing as required by statute.* Heimerle received ten years.**

On November 24, 1976, the Court of Appeals Affirmed the convictions in Heimerle II. The Court also granted the government's motion to withdraw their appeal on this date without reviewing the sentence or stating their reasons for granting the government's motion. See, footnote * page 5 supra.

Reasons For This Petition

This Court in United States v. Hayes, 553 F 2d 824, 828 recognized:

> "the prejudice to appellant that inevitably results from the introduction of a conviction for the same crime as that for which he is on trial."

Another Court recognized the danger of introducing convictions for the same sort of crimes, for impeachment purposes. That Court said that the decision to do so must be weighed carefully; the probative value must far outweigh the inherent potential for prejudice. United States v. Smith, 551 F 2d 348, 359-60. See, also, Weinstein's Evidence, 1976 404[04].

This Circuit long ago recognized the need to maintain a criminal defendant's right to the presumption of innocence, as did the Supreme Court, see, Nash v. United States, 54 F 2d 1006, and

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* "The Court shall fix a time for the hearing, and Notice thereof shall be given to the defendant...and...the United States at least 10 days prior thereto." 18 U.S.C. 3575(b). Moreover, the United States believed that they were to serve Notice on the attorney to meet the 10 day requirement of 3575(b). The statute clearly places this burden on the Court. Failure to comply with the statute's requirements mandates dismissal of the Notice.

** At any rate, Heimerle was sentenced for conspiring with coconspirators known & unknown. The obvious question is unknown because of who?

Michelson v. United States, 335us469(1948); and Boyd v. United States, 142us450 (1892):

> "...defendant's character, disposition and reputation in prosecutor's case-in-chief is closed." Michelson, supra.

More recently this Circuit continued the vitality of Michelson in United States v. Harrington, 490 F 2d 487 (1973). A case wherein a defendant's "mug Shot" was deemed enough to warrant reversal. The "mug Shot" was shown to the jury for one purpose but the Court noted that the prejudice from defendant's prior criminal record being made known to the jury violated:

> "[b]asic tenet of our criminal law. If at his trial, a defendant does not take the witness stand in his own defense, and if he has not himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal record concealed from the jury. The defendant's right to this protection is so well understood that the discussion of it is unnecessary." accord Ralls v. Manson, 375 F Supp 1271(D.Conn.) rev'd on other grounds 503 F 2d 491. (Waterman writing for the Court)

It is arguable that a "mug shot" does not indicate that a defendant was convicted for a crime. However, in the trial below the jury was informed of Heimerle being in a half-way house, which of course, leaves no room for doubt as to at least one prior conviction.

The jury was advised of Heimerle's "half-way-house" status; while on direct testimony at page 24 of the trial transcript. Realistically speaking the statement was made when only ten pages into the government's case.

Horwitz stated:

> "He told me at that time he was in the half-way-house, that he had a limited time to talk to me, because he had to get back to his place before eleven o'clock that evening." (Tr.p.24)

The answer was not unanticipated by the prosecutor because when he had Horwitz before the Grand Jury on March 2, 1976. Horwitz made almost the identical statement. Factually, Horwitz testimony tracks his grand jury testimony.

Horowitz also stated while on direct:

> "He[Heimerle]stated he met Joe Peters in GreenHaven Prison." (Tr.p. 77-78)

in answer to a question about <u>his</u> [Horwitzs'] criminal background.

During cross-examination Horwitz again blurts out:

> "His[Heimerle's]: where he met Mr. Peters. That's where he met Mr. Peters: in GreenHaven Prison." (Tr.p. 92)

to a question that was not asked of him, as noted by the Court:

> "Mr. Horowitz, you didn't hear the question, evidently. He wanted to know whether he, meaning the other person, discussed <u>your</u> criminal background with you at that time. (Tr.p. 92)

Heimerle's attorney promptly moved for mistrial on each occasion.

Further into the trial, during the government's case-in-chief. Peters corroborates Horwitzs' earlier testimony. This was extracted from Peters by Judge Pollack to inflame the jury in the

following manner:

> COURT: How long did you know him[Heimerle]?
> PETERS:I Would say roughly a year.
> COURT: How did you know him? Did you know him [Heimerle]socially?
> PETERS:Socially.
> COURT: You know him socially. How did you know him[Heimerle]?

At this point everyone but the jury knew what was coming. So Heimerle's attorney stated:

> Mr. POLLACK: Your Honor, may I send a note to the court? *

(continued Peters)

> PETERS: Socially.
> COURT: You knew him socially. How did you know him[Heimerle?]

At this point Heimerle's counsel had to violate Judge Pollack's Courtroom Rules in order to prevent an answer that would cause a mistrial.

> MR. POLLACK: Your Honor, I would like to object to the question.
>
> COURT: Overruled.
> (continuing)
> How did you know him?

Peters answered softly to this question.

> PETERS: I met him[Heimerle]in prison.

Judge Pollack bellowed,

> COURT: WHERE!

Peters retorted in the same tone of voice,

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* Attornies are not permitted to object in front of the jury as per the rules promulgated by Judge Pollack. (TR.p. 21)

PETERS: IN PRISON. GREENHAVEN!!!

In United States v. Warf, 529 F 2d 1170 (1976). A case on all four the Court held:

> "That defendant had served time in federal prison was matter inappropriately before the jury where defendant had not taken the stand and evidence of good character had not been introduced."

Heimerle's attorney timely moved for a mistrial. Which was denied. (Tr.p. 317)

The issue of the above errors was brought to this Courts attention by Heimerle's court appointed attorney. The government in their brief lead this Court to believe that the only exposure of Heimerle's prior convictions came from Heimerle's trial counsel at page 91. See government brief Point V. The government did, however, cite United States v. Vario, 484 F 2d 1052 for the proposition that F.R.Evid 803(22) sanctions the admission of certified copies of conviction to establish a defendant's prior convictions. That rule allows:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty(but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment...."

Based on the Rule relied upon by the government in Vario, the certified copy of Heimerle's prior convictions was not used for

the purpose intended. That is, to impeach testimony. What the government has done in the trial below is unprecedented due to the fact that if permitted there could never be another trial held wherein defendant;s with prior criminal records could obtain a fair trial -- based only on evidence of the crime that comes from the witness stand.

Further, if the date of the indictment below, April 29, 1976, had been properly cited to this Court. It would have been appaent that Heimerle was entitled to joinder of indictments under Rule 13 F.R.Crim. P. or joinder of defendant's and offenses under Rule 8 (a) and/or (b). As evinced by the test in United States v. Foutz, 540 F 2d 733, 736-37. i.e., joinder of offenses are prejudicial unless evidence of one offense would be admissable as evidence of identity in trial of second offense. Which is why the Court allowed the Heimerle II conviction into evidence.

Arguably, had Heimerle's activities been presented to one Grand Jury, and had that one Grand Jury indicted all the defendants involved, i.e., the Potter, Kaufman or Fink Grand Juries, decided to indict all the defendant's in one indictment with multiple counts. Under the rule of this Circuit any claim that would have been made of multiple conspiracies would have fell on its face. See, United States v. Moten, 566 F 2d 620,626, and cases cited therein.

Also, had the Grand Jury system not had been abused Heimerle might have been afforded due process inasmuch as one Grand Jury

reviewing all of the evidence in an informed manner may have chosen to:

> "Serve its historical role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." U.S.v. Dionisio, 97 S.Ct. at 773 accord U.S. v. Phillips Petroleum Co., at [5][6][7]&[10] &[11]of case no. 1, see[5] of case no. 2; also see, U.S. v. Provenzono,citing Phillips, supra.

The Court encroached upon the fact-finding-process of the jury when he answered questions asked by the foreman pertaining to Counts 2 and 4 during their deliberations. The Court further encroached by voluntarily distinguishing "yellowish" one-hundred dollar notes in Count 2 and the "better" batch in Count 4. Factually, the indictment does not charge Heimerle or Warme with dealing in "yellowish" or a "better batch" in either count. That distinction was soley for the jurors to decide, alone.
The fact that the jury announced that some of them will not believe the testimony of any of the co-conspirators - indicted or otherwise. When coupled with the Courts voluntary distinction of the evidence as stated above, impinged upon the guilt finding-fact finding process.
If the law requires an "agreement" to be the prerequisite to a conspiracy, and it does. Well, then, the juries disbelief of all of the co-conspirators indicted or otherwise. Renders the verdict inconsistent and should come under the plain error rule.

It is inconceiveable that a conspiracy could have existed without first believing at least one of the co-conspirators. Based on the juries disbelief of the witnesses that WAS necessary to establish a formulation of a conspiracy. The Court below was bound to dismiss on insuffiency of the eVidence.

The most severe sentence for counterfeiting violations in this Circuit is 1.5 years prison, and the least severe sentence is 2 years probation. Second Circuit Sentence Study.
The nationwide average sentence for counterfeiting offenses is 42 months. The most severe nationwide is 49 months. Accord 95th Cong. 1st Sess. on sentencing disparity, at 8903, 8906-07.
The average sentences include recidivists.
Under the test formulated by the Court who sentenced Neary[U.S.v. 552 F 2d 1184. Heimerle's sentence is disproportionate, and at the very least, Heimerle should be resentenced taking this and the fact that the sentence of seven years imprisonment-five years probation, to follow, imposed by Judge Matzner. The ten year consecutive sentence imposed below; founded on Judge Metzner's judgment of conviction. All stem from the same continuing offense.

It is requested that this Court take Judicial Notice of all the above stated facts and circumstances. And that the Court extend the time for filing exhibits that substantiate claims above made. Since there is not enough time available to produce

the documents necessary for a fair and just review.

It should also be noted that Heimerle's court appointed attorney, E.J.Piel, was not notified of this panel's opinion according to the notations made on the face of the opinion. i.e., someone inadvertantly notified Heimerle's trial attornies brother. Who is at this time a member of the local Bar. cf. page 12 supra.

CONCLUSION

THE DECISION AND OPINION PREVIOUSLY RENDERED BY A PANEL OF THIS COURT MUST BE AMENDED TO COMPORT TO THE FACTS OF THE CASE AND ERRORS ALLEGED:THEN THE CONVICTION MUST BE REVERSED: OR AT THE VERY LEAST HEIMERLE MUST BE RESENTENCED

Respectfully submitted,

James F. Heimerle
appellant-pro se
PMB 01873
Atlanta,Ga.30315

DATED: Atlanta, Georgia
March 16, 1978

Sworn to before me this

MAR 16 1978 day of March, 1978.

Parole Officer: Authorized by the Act of July 7, 1955 to Administer Oaths (18 U.S.C. 4004).

AFFIRMATION OF MAILING

James F. Heimerle, on this 16th day of March, 1978 served on the appellee, United State of America, a true and correct copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Beanc, by placing same into the u.s.mail at the Atlanta Federal Penitentiary.

True and correct copies were also sent to Heimerle's court appointed attorney: E.J. Piel, Esq.

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